No. 84-1361

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA,
Petitioner

v.

KENNETH MOSES LOUD HAWK, *et al.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF AMICUS CURIAE, PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

The Public Defender Service for the District of Columbia offers this brief as amicus curiae in support of Respondents.

The Public Defender Service is an independent agency of the District of Columbia providing legal representation at the trial and appellate levels to indigent persons charged with crimes in the District. Each year the Service represents thousands of persons charged with serious offenses. In Fiscal Year 1984, for example, the Service represented sixty-five percent of the homicide defendants in the Superior Court of the District of Columbia. Sixty-

eight percent of the agency's felony clients faced charges with offenses carrying potential life terms. The Service represented clients in fourteen percent of the criminal cases in the District of Columbia Court of Appeals.

The United States Attorney prosecutes all serious crimes in the District of Columbia on behalf of the United States. District of Columbia law authorizes pretrial and midtrial government appeals to the fullest extent allowed by the Constitution of dismissals and orders suppressing or excluding evidence. By statute and court rule, these appeals must be expedited. However, because the District of Columbia lacks a local speedy trial statute, and the federal Speedy Trial Act does not apply, the Speedy Trial Clause of the Sixth Amendment provides the exclusive source of criminal defendants' and society's right to a speedy trial. Lengthy delays before criminal trials are widely perceived as a serious problem.

The Court's decision in the present case will have a significant impact on amicus and the administration of criminal justice in the District. In its interpretations of the Speedy Trial Clause, the District of Columbia Court of Appeals includes the time consumed by pretrial government appeals as part of the overall pretrial delay. The Court weighs unavoidable appellate delay as a neutral factor against the government comparable to delay from trial court congestion. Unreasonable delay caused by a failure to expedite as required counts as significant delay against the government. Still, the Court of Appeals has never found a speedy trial violation based in any part on government appeal time, even though District case law indulges a presumption of constitutional violation when overall pretrial delay exceeds one year. Thus, judicious consideration of the time devoted to pretrial government appeals does not limit the government's right to appeal, takes full account of the deliberative nature of the appellate process, and rarely leads to dismissal of criminal charges. Reversal of the Ninth Circuit decision

in this case on the primary ground advanced by Petitioner would reverse the District's speedy trial case law and eliminate the motivation of judges, prosecutors, and defense counsel to expedite pretrial government appeals.[1]

Examination of the District of Columbia experience in administering the constitutional speedy trial guarantee sharply undercuts Petitioner's policy arguments for excluding time spent on government appeals. The Public Defender Service submits this Brief to show that the balanced approaches of the Ninth Circuit and District of Columbia Courts of Appeals flow naturally from this Court's endorsement of flexibility in enforcing the speedy trial guarantee and promote the Sixth Amendment values of prompt and fair resolution of criminal cases.

SUMMARY OF ARGUMENT

Petitioner urges the Court to repudiate the "sensitive balancing process," *Barker* v. *Wingo*, 407 U.S. 514, 533 (1972) (footnote omitted), utilized by the Ninth Circuit for resolving speedy trial claims when government appeals have caused pretrial delay and instead to adopt a rule of blanket exclusion of pretrial appeal time. Petitioner's proposed rule cannot be reconciled with the understanding of speedy trial principles which commended a functional analysis to this Court in *Barker*, and Petitioner's meager attempts to distinguish *Barker* fail. Neither the question of who sets the pretrial proceeding in motion nor who wins on appeal has any logical bearing on the appropriateness of holding the

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[1] The District of Columbia Court of Appeals has not considered whether to include time devoted to pretrial defendant appeals in evaluating speedy trial claims. Petitioner argues that this delay also should be excluded from the speedy trial calculus. Reversal of the court below for including the time for Respondents' pretrial appeal would remove the motivation which currently exists in the District for expediting double jeopardy appeals and would impinge on defendants' right to take those appeals.

government accountable for delay in the appellate courts, so long as both sides have litigated without dilatory objectives.

The experience of the District of Columbia in administering the Sixth Amendment speedy trial guarantee conclusively demonstrates that Petitioner's pragmatic arguments lack any foundation in reality. The District of Columbia Court of Appeals includes the time of pretrial government appeals in calculating the overall delay and assigns weights against the government for the periods of delay according to the circumstances of each case. In a jurisdiction where the United States Attorney has primary responsibility for criminal law enforcement and actively exploits a broad right of pretrial appeal, this speedy trial rule has produced the desirable consequence of pressuring the parties and the appellate court into prompt resolution of pretrial appeals, without any disservice to the deliberative nature of the appellate process, and has never led to the harsh remedy of dismissal.

ARGUMENT

THE TIME ATTRIBUTABLE TO PRETRIAL APPELLATE REVIEW OF RULINGS ON DEFENSE MOTIONS SHOULD BE INCLUDED IN CALCULATING THE LENGTH OF DELAY IN SPEEDY TRIAL CLAIMS, WITH WEIGHT APPROPRIATELY ASSIGNED ACCORDING TO THE REASONS FOR THE DELAY

In *Barker v. Wingo*, 407 U.S. 514 (1972), the Court concluded that inquiry into a speedy trial claim requires a "functional analysis" in the particular context of a case. *Id.* at 522. When faced with a defendant's assertion that the right to a speedy trial has been abridged, a court must engage in the "sensitive balancing," *id.* at 533 (footnote omitted), of at least four factors—the length of pretrial delay, the reasons for the delay, the defendant's assertion of the right, and prejudice to the

accused, *id.* at 530. The Ninth Circuit applied this "functional approach" to Respondents' speedy trial claim in a case where government appeals and defendants' cross-appeal consumed some six years of pretrial delay. *See United States v. Loud Hawk*, 741 F.2d 1184, 1191 (1984) (Pet. App. at 12a). The court interpreted the Speedy Trial Clause, consistent with the teachings of *Barker v. Wingo*, to require inclusion in the pretrial delay calculus of the extraordinary time taken by the appeals. Specifically, the court parsed the time of these appeals into distinct periods and assigned particular weights against the responsible parties, after considering the reasons for the appeals, the interests served by pretrial resolution of the claims, the entitlements of the parties to litigate them pretrial, and the reasons for the appellate delay. *Id.* at 1191-1192 (Pet. App. at 12a-15a).

The Ninth Circuit's flexible balancing approach is nearly identical with the speedy trial analysis of the District of Columbia Court of Appeals, which also includes the time on pretrial government appeals in calculating the length of delay.[2] *Graves v. United States*, 490 A.2d 1086, 1095-96 (D.C. 1984) (en banc), *petition for reh'g pending*; *Ball v. United States*, 429 A.2d 1353, 1356-57 (D.C. 1981); *Day v. United States*, 390 A.2d 957, 964-69 (D.C. 1978), *overruled in part on other grounds*, *Graves v. United States*, 490 A.2d at 1095. These functional tests are a small, seemingly obvious extension of *Barker v. Wingo*. Yet, Petitioner urges the Court to replace them with an ironclad rule of automatic exclusion of all pretrial appeal time. Essentially, Petitioner wants to resurrect a rigid, formalistic style of

[2] The District of Columbia Code does not contain a speedy trial statute and the federal Speedy Trial Act does not apply. *United States v. Alston*, 412 A.2d 351, 356 n.10 (D.C. 1980) (en banc). Therefore, the Speedy Trial Clause of the Sixth Amendment provides the exclusive source of any enforceable right to a prompt trial in the local courts.

speedy trial analysis rejected by the Court in *Barker v. Wingo* as insufficiently sensitive to the urgency and difficulty of providing defendants and the public a swift but fair resolution of criminal charges.

Petitioner is flatly wrong in its claim that only its rule of blanket exclusion can protect the government's right to pretrial appeals, for the District of Columbia experience proves the opposite: Federal prosecutors in the District conduct an active practice of pretrial appellate litigation, and although the appeal time counts against the government in the speedy trial calculation, judicious application of the *Barker v. Wingo* principles forces all parties to expedite the appeals, and the government has never been confronted with the ultimate sanction of dismissal of the charges.

This Court has recognized previously that both defendants and society have compelling interests in the prompt resolution of criminal cases. The constitutional speedy trial guarantee gives defendants "an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself." *United States v. Ewell*, 383 U.S. 116, 120 (1966), quoted in *United States v. Marion*, 404 U.S. 307, 320 (1971). *See also United States v. MacDonald*, 435 U.S. 850, 858 (1978) (*MacDonald I*); *Barker v. Wingo*, 407 U.S. at 532; *Dickey v. Florida*, 398 U.S. 30, 37-38 (1970); *id.* at 42 (Brennan, J., concurring); *Klopfer v. North Carolina*, 386 U.S. 213, 221-26 (1967). At the same time, the speedy trial right promotes the community's goal of effective law enforcement by providing the swift judgments upon which deterrence and rehabilitation depend. *Barker v. Wingo*, 407 U.S. at 519-21. These common, strong interests do not evaporate, but operate with full vigor, when the government pursues a pretrial appeal. Whether pretrial delay occurs

at the trial or appellate level, the attendant anxiety, the oppressiveness of pretrial incarceration, and the harm to the defense are indistinguishable. Similarly, even when the government correctly decides that resort to the appellate process is vital to protecting its interests, the community's goals of promptly convicting and punishing the guilty and freeing the innocent are impaired by appellate delay. Thus both parties presumptively share an interest in seeing that an interlocutory appeal is quickly decided. Permitting pretrial government appeals to linger benefits few, if any, defendants, and certainly not society at large. To protect the values of the Speedy Trial Clause, expedition of government appeals ought to be the rule and not the exception.

Government accountability for the delay attributable to its appeals follows logically from the Court's speedy trial analysis in *Barker v. Wingo*. There, the Court acknowledged that while the accused has a strong interest in a speedy trial,

> [a] defendant has no duty to bring himself to trial; the State has that duty as well as the duty of insuring that the trial is consistent with due process. Moreover, . . . society has a particular interest in bringing swift prosecutions, and society's representatives are the ones who should protect that interest.

407 U.S. at 527 (footnotes omitted). The government's right to appeal district court orders dismissing charges or suppressing or excluding evidence, *see* 18 U.S.C. § 3731, is premised on the identical interest in effective but fair law enforcement as underlies society's right to a speedy trial when the government does not resort to the appellate court. *See United States v. Barletta*, 644 F.2d 50, 54-56 (1st Cir. 1981); S. Rep. No. 1296, 91st Cong., 2d Sess. (1970); *cf. Arizona v. Manypenny*, 451 U.S. 232 (1981); *United States v. Wilson*, 420 U.S. 332 (1975). Arguably, even less reason exists to relieve the

government of its obligation to provide speedy trials when the prosecution chooses to assume the burden of persuading the appellate courts that presumptively valid district court orders are incorrect.

The government's constitutional duty to bear the weight for its appeals is obviously not an obligation to suffer inexorably dismissals which produce windfalls for defendants. In fairness, the weight should vary, depending on the circumstances of each case. "[D]ifferent weights should be assigned to different reasons." *Barker v. Wingo*, 407 U.S. at 531. For example, if the government fails to expedite its appeal, it fails to fulfill its obligation to "bring[] swift prosecutions," *id.* at 527; consequently any time greater than an expedited appeal should normally require properly counts more against the prosecution in the speedy trial calculus. If, however, the government shows proper sensitivity to the Sixth Amendment and expedites its appeal, then the delay is appropriately "attributed to the processes of the court," *United States v. Loud Hawk*, 741 F.2d at 1191 (Pet. App. at 13a), and is akin to delay due to overcrowded courts. Accordingly, it should be assigned "neutral" weight against the government, "since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." *Barker*, 407 U.S. at 531.

These principles are applied in the District of Columbia. By statute, 23 D.C. Code § 104 (1981), the prosecution is permitted pretrial and midtrial appeals from orders dismissing charges, or suppressing evidence, or otherwise denying the prosecution the use of evidence at trial; and the right is liberally construed. *District of Columbia v. McConnell*, 464 A.2d 126, 128-30 (D.C. 1983). "In order to minimize the delay from pretrial appeals . . . Congress mandated that '[a]ny appeal taken pursuant to [§ 23-104] either before or during trial shall be expedited.'" *Graves v. United States*, 490 A.2d 1086, 1095

(D.C. 1984) (en banc), *petition for reh'g pending*, quoting § 104(e). Local court rule prescribes the procedure for expediting pretrial government appeals, *see* D.C. App. R. 4(c), and the Court of Appeals' *Internal Operating Procedures* (1985) assign priority to opinion writing in government appeals, *id.* at 12.

In *Day v. United States*, 390 A.2d 957 (D.C. 1978), *overruled in part on other grounds, Graves v. United States*, 490 A.2d at 1095, the Court of Appeals "settle[d] the question whether the period of interlocutory appeal by the government 'counts'" for speedy trial purposes. 390 A.2d at 965.

> Absent a rigid speedy trial timetable . . . we have to examine whether the appeal period provides any inherent reason why it should not be counted as part of the balancing test along with the period of trial court jurisdiction. Under the principles of *Barker v. Wingo* . . . we find no such reason; we hold that the appeal period should be counted.

Id. (citation omitted). The court was persuaded that "it would be disingenuous to suggest that the entire time during which a case is under advisement is consumed in unraveling complex issues." *Id.*, quoting *United States v. Sarvis*, 523 F.2d 1177, 1183-84 (D.C. Cir. 1975). Because appellate delay is a product of calendar backlog, the court concluded that pretrial appeal time must be considered the government's responsibility. *Id.* The court perceived no distinction between appellate court congestion and trial court congestion: "If trial courts must expedite their procedures under the Sixth Amendment no reason appears why appellate courts should not be subjected to similar constitutional constraints. . ." *Id.*, quoting *Sarvis*, 523 F.2d at 1184.

Recently, the court fine-tuned its analysis of government appeal time under the Speedy Trial Clause. *See Graves*, 490 A.2d at 1095-96. It reaffirmed the holding

in *Day* that appellate time "counts" against the government for speedy trial purposes, but withdrew from *Day*'s suggestion that the entire time weighs "significantly" unless the prosecution moves to expedite.

> . . . [W]e adhere to the concept of an intermediate category between neutral delay and intentional delay, and we continue to follow *Day* in labeling "significant" delays caused by government indifference or neglect. However, we hold that *Day*'s rigid rule—that, in the absence of a motion to expedite, all pretrial government appeal time must be counted as a significant charge against the government—is not in conformity with the *ad hoc* approach to speedy trial claims mandated by *Barker v. Wingo* . . . . The government has been given explicit authority to appeal before trial orders suppressing evidence. . . . Since some delay in the trial necessarily attends invocation of the appellate process, we think it inappropriate to count all such time automatically as significant delay.

Id. at 1095 (citations omitted). Accordingly, the court refined the balance "to distinguish between delay that could not have been avoided by efforts to expedite and unreasonable delay resulting from the failure to expedite." *Id.* at 1096.

> Unavoidable delay should be considered neutral, and thus counted against the government to roughly the same degree as delay caused by court backlog. Unreasonable delay caused by failure to expedite the appeal should be considered significant.

Id.

Thus the District of Columbia Court of Appeals has deftly struck a balance that is sensitive to both the values underlying the Speedy Trial Clause and the government's right to pretrial appeals. It enforces the speedy trial right by including pretrial appeal time and holding the government accountable for it, but it accommodates the

government's appeal right by giving significant weight only to "*unreasonable* delay caused by failure to expedite."

Petitioner fears that this delicate approach, a variant of which the Ninth Circuit applied below,[3] will wreak havoc, and it offers up assorted pragmatic arguments to prove its point. But first, almost in passing, Petitioner proposes that as a logical matter the Speedy Trial Clause should be tolled during the pendency of government appeals because the proceedings "have been set in motion by the defense." *See* Brief for Petitioner at 21-22. The argument is plainly wrong. For one thing, the argument wholly ignores the public's right to a speedy trial. The government's rule of exclusion would do nothing to impel "society's representatives," *Barker*, 407 U.S. at 527, to protect the community's interest in "swift prosecutions," *id.* Moreover, the argument proves far too much, because the underlying premise is vacuous.[4] When the defense moves to suppress evidence unconstitutionally seized, it could just as well be argued that those proceedings are "set in motion" by the government's agents' conduct claimed to be illegal. If the district court rules for the defense and concludes that the government acted illegally, the prosecution has little standing to assert that the defense is responsible for setting the appeal in motion. At bottom, of course, so long as neither side is acting for purely dilatory purposes, both defendants and society have an overriding interest in fair trials. Our entire system depends on and encourages vigorous advocacy including skillful pretrial litigation by both sides. Thus the question of who initiated a proceeding which

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[3] The Ninth Circuit's formulation is more advantageous to the government: All appellate time counts neutrally, including "unreasonable delay caused by failure to expedite." *See United States v. Loud Hawk*, 741 F.2d at 1191-92 (Pet. App. at 12a-15a).

[4] The logic of petitioner's hypothesis leads to the conclusion that all pretrial delay should be excluded, because the proceedings are set in motion by the defendant's (illegal) acts.

ultimately motivates a pretrial government appeal is utterly irrelevant to the question of whether a trial was swift as well as fair.

Petitioner reinforces a weak argument with the corollary notion that the government typically wins its interlocutory motions, because defendants *presumptively* file legally erroneous, frivolous, or dilatory pretrial motions. Predictably, Petitioner uses the fact that the government prevailed in its interlocutory appeals below to its best rhetorical advantage. But analytically, the question of who wins these appeals is irrelevant, because the interests underlying the speedy trial right are jeopardized by appellate delay, whoever prevails. Indeed, Petitioner implicitly acknowledges that "winning" has no logical bearing on its argument, for it does not offer an exception to its blanket rule for instances when the government is not vindicated; nor does it attempt to justify its rule for the cases in which it registers "losses." [5]

With support from single statistic purporting to demonstrate a seventy-five percent win rate on its appeals, *see* Brief for Petitioner at 29 n.17, Petitioner insinuates that because it usually wins its pretrial appeals, there is a strong public interest in prosecuting those appeals; consequently, all appellate time should be excluded automatically from the speedy trial calculus. In truth, the govern-

[5] Even when the government ultimately prevails on appeals, it will often be hard to conclude that diligent counsel erred by filing pretrial motions, let alone prove the government's premise that defendants file presumptively "legally erroneous motions," Brief for Petitioner at 22. Petitioner ultimately acknowledges that the legal issues in the two appeals here were far from clear-cut: "[T]he length of time consumed by the court of appeals in deciding the first two appeals, while considerable, may not have been wholly unreasonable in view of the complexity of the issues . . . and the delay that may have been occasioned while awaiting this Court's decision in *United States v. Hollywood Motor Car Co.*, [458 U.S. 263 (1982)], which was dispositive of the second appeal." Brief for Petitioner at 23-24 n.13.

ment's blanket exclusion rule would ignore appellate delay in the many cases—perhaps the far larger universe of cases—in which the government ultimately dismisses its appeals or loses in the appellate court. Since 1983, the United States Attorney, who prosecutes all felonies and almost all misdemeanors in the District of Columbia, has taken forty-two pretrial appeals to the District of Columbia Court of Appeals.[6] In the vast majority of these cases (twenty-four), the United States voluntarily dismissed the appeals after further reflecting upon their merits. It is not uncommon for the United States to dismiss a pretrial appeal after a considerable length of time. *See, e.g., Graves v. United States*, 490 A.2d at 1094 (six months). Thus, few (nine) of those appeals have reached final judgment. Of these, the trial court judgments were affirmed in six cases. In only three of the thirty-three closed cases (*i.e.*, roughly 9%) did the United States obtain either a reversal or remand. In 1985 alone, the United States lost four of the five pretrial appeals reported as of late July by the Court of Appeals. *See United States v. Bailey*, —— A.2d —— (No. 84-240, decided July 25, 1985) (affirming); *United States v. Mosby*, —— A.2d —— (No. 84-1694, decided July 3, 1985) (affirming); *United States v. Gayden*, 492 A.2d 868 (1985) (affirming); *United States v. Sell*, 487 A.2d 225 (1985) (reversing); *United States v. Lewis*, 486 A.2d 729 (1985) (affirming). This experience proves convincingly that petitioner's ubiquitous contention that defendants "induce[] the trial court[s] to err," Brief for Petitioner at 22, is entirely incorrect.[7]

[6] At the request of amicus, the Clerk of the Court of Appeals provided a computer print-out of all government appeals lodged since January 1, 1983. This print-out was reviewed for accuracy by the Appellate Division of the U.S. Attorney's Office for the District of Columbia, and cross-checked with the records of amicus and the files of the trial court.

[7] It is also not unusual for the prosecution to re-consider and substantially narrow the issues it presents on appeal. *See, e.g.,*

Petitioner intimates that a rule that includes appellate time in the speedy trial analysis deters the government from filing meritorious appeals. *See* Brief for Petitioner at 24-25. Revealingly, the government does not cite a single instance where it forewent an interlocutory appeal because of speedy trial concerns. If experience is any guide, the United States pursues an active program of pretrial appeals in the District of Columbia: Fully eight percent of the appellate caseload of amicus in the most recent fiscal year were government appeals; projections for the current fiscal year suggest that the number of government appeals will double last year's figure. Plainly, the District's speedy trial rule, which includes government appeal time, has not deterred filing of interlocutory appeals. Of course, so long as the government expedites its appeal, it has nothing to fear from the speedy trial implications of its actions (assuming good faith), because the District of Columbia Court of Appeals (like the Ninth Circuit) weighs neutrally the time devoted to expedited appeals. *See* page 10, *supra*.

Petitioner also argues that a rule of inclusion overlooks the "especially unhurried" pace of the appellate process. Brief for Petitioner at 25. Contrary to Petitioner's suggestion, *id.* at 26, it makes perfect "sense to require that the appellate process proceed with the speed required of trial courts by the Sixth Amendment." *Id.* For "it would be disingenuous to suggest that the entire time during which a case is under advisement is consumed in unravel-

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United States v. Mosby. In *Mosby*, the government's Notice of Appeal complained about the trial court's suppression of evidence on constitutional grounds. The issue ultimately presented was however, far narrower: whether the trial court erroneously decided that certain evidence is irrelevant. The Court of Appeals found no abuse of discretion and affirmed, observing as well that the trial judge's ruling was necessarily tentative and could be reconsidered as the trial progressed. —— A.2d at ——, slip op. at 5. Parenthetically, this probable advisory opinion took seven months to issue, though it was expedited.

ing complex issues." *Day v. United States*, 390 A.2d at 965. From a functional perspective, because trial court delay and appellate court delay disadvantage defendants and the community to the same degree, no distinction can be drawn between the courts. Since trial courts must expedite their processes to avoid speedy trial injury, appellate courts also must expedite interlocutory appeals to avoid the same harm.

Petitioner repeatedly voices fear that including the time attendant to appellate delay routinely will trigger burdensome speedy trial inquiries. *See* Brief for Petitioner at 28-30. Petitioner's point is partially correct. Particularly in jurisdictions where a constitutional violation is presumed by the passage of a certain period of time before trial,[8] speedy trial inquiries can be expected in those few cases delayed by a government appeal. But "a complete analysis and balancing of the *Barker* factors," Brief for Petitioner at 29, cannot truly be the cause of such consternation. Clearly, Petitioner has offered no evidence that speedy trial claims are clogging the trial or appellate courts, let alone those cases where the government appealed. Moreover, Petitioner fails to mention that speedy trial motions have the desirable effect of keeping enforcement of the speedy trial right in the public eye. Where the government can justify the delay, the motion to dismiss will be denied, in the absence of actual impairment to the defense, "which skews the fairness of the entire system," *Barker*, 407 U.S. at 532. In fact, if the government's appeal shows the complexity of the case, then the greater is the delay that will be tolerated. *Barker*, 407

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[8] The District of Columbia indulges a presumption of constitutional violation after the passage of one year: "In our previous cases we have said, variously, that a delay of more than a year gives prima facie merit to a claim that an accused has been denied the right to a speedy trial, creates a presumption of prejudice, and shifts the burden to the government to justify the delay." *Graves v. United States*, 490 A.2d at 1091.

U.S. at 531. Absent exceptional circumstances, then, post-appeal speedy trial scrutiny should only have the salutory effect of having prompted expediting the appeal in the first place.

Indeed, the experience of the District of Columbia shows conclusively that petitioner's fear is not realistic. In its three reported decisions involving speedy trial claims after government appeals, the Court of Appeals has found no violation of the speedy trial right. *See Graves v. United States*, 490 A.2d 1086; *Ball v. United States*, 429 A.2d 1353; *Day v. United States*, 390 A.2d 957. In the latter case, the court tolerated a 32½ month long delay between arrest and trial that included an 18½ month long government appeal, even though the appellate time was weighed as significant against the government.

It is telling that petitioner fails to cite a single instance other than this case where a court found a speedy trial violation on account of delay due to a government pretrial appeal. In fact, petitioner observes that appellate delay is not "a serious and systemic problem." Brief for Petitioner at 31. The import of this is clear: The government is justified in worrying about dismissal in only the truly extraordinary cases, such as this one. But this Court can be confident that affirmance of the Ninth Circuit would ensure that this situation will never recur.[9]

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[9] Petitioner also suggests that time devoted to pretrial defense appeals should be excluded from the speedy trial calculus. Brief for Petitioner at 35-36. The inordinate brevity of Petitioner's argument only highlights the fact that consideration of the time consumed by Respondents' cross-appeal was not essential to the Ninth Circuit's decision. *See United States v. Loud Hawk*, 741 F.2d at 1192 (Pet. App. at 15a). The bulk of the time consumed by Respondents' appeal (23 months) was wholly attributable as well to the government's second appeal. "The additional delay of six months that occurred as a result of [Respondents] seeking certiorari from the judgment of [the circuit] court dismissing the [cross-]appeal" was, moreover, "wholly excused." *Id.* That time was effectively subtracted from the overall pretrial delay and therefore did not "count" against the government.

Perhaps a rule of exclusion, such as the one applied by the Ninth Circuit with respect to the time consumed by Respondents' meritless certiorari petition, is an appropriate one for wholly frivolous pretrial appeals by defendants. Much as time consumed by defense-requested trial continuances is properly subtracted from the delay, the time devoted to such appeals might be excludable. But a blanket rule of exclusion, such as the one Petitioner urges, is overbroad. This Court has recognized a vital interest in pretrial double jeopardy appeals, *Abney v. United States*, 431 U.S. 651, 660-62 (1977), which would be burdened intolerably by a rule of exclusion. For as the Court acknowledged in *Barker*, defendants cannot be held responsible for court congestion. 407 U.S. at 531. The proper accommodation between the speedy trial and double jeopardy rights is, as the Court observed in *Abney*, "rules or policies giving [double jeopardy] appeals expedited treatment." 431 U.S. at 662 n.8. *See Gant v. United States*, 467 A.2d 968, 970 (D.C. 1983); *Coleman v. United States*, 414 A.2d 528, 530 (D.C. 1980).

CONCLUSION

For the foregoing reasons, the amicus curiae, the Public Defender Service for the District of Columbia, submits that the judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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